

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

ROBERT WILKINS,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

DK REALTEC,
Respondent Employer,

EMC INSURANCE COMPANY,
Respondent Insurer.

No. 2 CA-IC 2019-0004
Filed September 17, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Spec. Act. 10(k).

Special Action – Industrial Commission
ICA Claim No. 20170-550289
Insurer No. Z01297585
Layna Taylor, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Robert Wilkins, Florence
In Propria Persona

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The Industrial Commission of Arizona, Phoenix
By Gaetano Testini
Counsel for Respondent

Jardine, Baker, Hickman & Houston PLLC, Phoenix
By Terrence Kurth
Counsel for Respondents Employer and Insurer

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

BREARCLIFFE, Judge:

¶1 In this statutory special action, petitioner Robert Wilkins challenges the Industrial Commission’s October 31, 2018 decision upon hearing denying his workers’ compensation claim, and the decision upon review. We affirm.

Issue

¶2 Wilkins contends that: 1) the Administrative Law Judge (ALJ) erred when she issued an award of a non-compensable claim; 2) the ALJ had a conflict of interest and should have recused herself; and 3) the ALJ abused her discretion by making an untimely ruling. Wilkins’ employer, DK Realtec, and its insurance carrier, EMC Insurance Company, contend the award was supported by the evidence. The issue is whether the ALJ’s award was reasonably supported by the evidence.¹

Factual and Procedural History

¶3 We view the facts in the light most favorable to upholding the award. *Hackworth v. Indus. Comm’n*, 229 Ariz. 339, ¶ 2 (App. 2012). On August 31, 2016, while working for DK Realtec, Wilkins fell five to six feet

¹Because Wilkins does not develop any argument for his assertions that the ALJ had a conflict of interest or issued an untimely ruling, we will not consider them. *State v. Moody*, 208 Ariz. 424, n.9 (2004).

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from a ladder, landing on his neck, upper back, and right shoulder. He immediately reported the fall, stating only that he felt “a lot of ‘pressure’ but not pain.” Wilkins continued to work two to three months after the fall, but then told his supervisor he could not assist with lifting cabinets due to his prior injury, and was subsequently put on light duty. He first sought medical treatment on February 21, 2017. Although Wilkins ultimately received work restrictions, by then he no longer worked for DK Realtec. His primary care provider, Dr. Eric Cox, prescribed pain medication and anti-inflammatory medications. Wilkins attended physical therapy for one day. He testified he could not continue physical therapy because his claim had been denied, but in his deposition said it was due to a lack of transportation.

¶4 Wilkins had MRI scans in April 2017. Dr. William Salyer, a board-certified orthopedic surgeon, examined Wilkins on August 16, 2017 and reviewed the MRI scans. He opined that because Wilkins did not seek treatment for six months after the fall, he likely suffered only a “strain.” Salyer concluded that Wilkins’ injury was stationary without permanent impairment, the need for work restrictions, or supportive care.

¶5 Dr. Walter Damper, a board-certified physiatrist, examined Wilkins on December 1, 2017, and diagnosed him with a herniated cervical disk. Dr. Damper was unaware of Wilkins’ 2016 fall at that time. When he became aware of the fall, he reviewed the report from February and opined that there was a “strong possibility” Wilkins’ fall caused his injury.

¶6 The ALJ issued a Decision Upon Hearing and Findings and Award on October 31, 2018, finding that, because Wilkins did not timely report any injury to the employer as required by A.R.S. § 23-908(E),² he was “not entitled to workers’ compensation benefits for any injury which may have occurred on or about September 1, 2016.” Wilkins filed a request for review. The ALJ affirmed the award on March 27, 2019. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Rule 10, Ariz. R. P. Spec. Act.

²The ALJ inadvertently cited to § 23-908(D), which is not at issue in this appeal. Section 23-908(E) states, “[w]hen an accident occurs to an employee, the employee shall forthwith report the accident and the injury resulting . . . to the employer, and any physician employed by the injured employee shall forthwith report the accident and the injury resulting . . . to the employer, the insurance carrier and the commission.”

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Analysis

¶7 “We will not disturb an ALJ’s findings of fact [in a workers’ compensation proceeding] so long as it is substantiated by competent evidence.” *City of Tucson v. Indus. Comm’n*, 236 Ariz. 52, ¶ 6 (App. 2014). The ALJ, and not this court, is in the best position to resolve issues of credibility and consistency of evidence. *See S.L.C. Leasing v. Indus. Comm’n*, 25 Ariz. App. 366, n.* (1975).

¶8 However, we need not review the ALJ’s decision here. With limited exceptions not relevant here, a petition for review of an Industrial Commission award must comply with the Arizona Rules of Civil Appellate Procedure. *See* Ariz. R. P. Spec. Act. 10(k). Rule 13(a)(5), Ariz. R. Civ. App. P. requires the appellant’s opening brief to contain a statement of facts “that are relevant to the issues presented for review, with appropriate references to the record.” Rule 13(a)(7)(A) requires argument with “supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies.” A table of citations, a statement of the case, a statement of the issues, and relief sought are also required. Rule 13(a)(2), (4), (6), (9). Here, Wilkins’ opening brief states, “[f]or citations, [i]ntroductions, statement of the case, statement of facts, statement of [i]ssues, arguments and [r]elief sought, Plaintiff/Appellant adopts the opening brief including [a]ttachments or [e]xhibits without any changes, additions, or corrections.” Because Wilkins makes that statement *in* his opening brief, with no other citations to the record, it is not clear what opening brief he is incorporating by reference.³ But for this purported incorporation-by-reference, Wilkins does not provide facts for us to consider, nor any argument; instead, he merely lists issues for our review. Even so, to address Wilkins’ listed issues would seemingly require us to reweigh the evidence, which we will not do. *See Pac. Fruit Express v. Indus. Comm’n*, 153 Ariz. 210, 214 (1987).

Disposition

¶9 Because Wilkins has failed to comply with the Rules of Civil Appellate Procedure as described above, we affirm the Decision Upon

³ Wilkins also refers to and incorporates material from a “First Amended Complaint” in a Maricopa County Superior Court action he initiated against his employer. This action may be where this “opening brief” can be found; however, that is not in the record before us and therefore we will not consider it. *Ashton-Blair v. Merrill*, 187 Ariz. 315, 317 (App. 1996) (“We may only consider the matters in the record before us.”).

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Hearing and Findings and Award and the Decision Upon Review
Affirming and Supplementing Decision Upon Hearing and Findings and
Award.